UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

WILLIAM BEAUMONT HOSPITAL
Respondent

and **Case 07-CA-093885**

JERI ANTILLA, an Individual
Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Counsel for the General Counsel ("GC"), pursuant to Section 102.46(h) of the Board's Rules and Regulations, respectfully submits the following Reply Brief addressing the arguments, inaccuracies, and misrepresentations set forth in Respondent's Answering Brief.[1]

I. RESPONDENT'S ASSERTION THAT IT DID NOT CONSIDER ANTILLA AND BRANDT'S PROTECTED CONCERTED ACTIVITIES IN DECIDING TO DISCHARGE ANTILLA AND BRANDT IS CONTRARY TO RECORD EVIDENCE

Respondent asserts (Ans. Br., p. 22) that it did not consider Antilla and Brandt's protected concerted activities in deciding to terminate them, and argues that the ALJ correctly found that the Respondent did not consider any protected concerted activities in making its termination decision. Respondent's assertions are contrary to the record evidence. As set forth more fully in the GC's Exceptions Brief (p. 32-34), the record is replete with evidence that, in deciding to terminate Antilla and Brandt, Respondent explicitly relied upon their protected

[1] Throughout this brief, "Ans. Br." refers to Respondent's Brief in Opposition to Exceptions; "GC's Exceptions Brief" and "Exc. Br." refer to Counsel for the General Counsel's Brief in Support of Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision; "Tr." refers to the transcript of the administrative hearing; "GCX," and "RX" refer to Counsel for the General Counsel's exhibits and Respondent's exhibits, respectively. Counsel for the General Counsel notes that the page numbers contained in the electronic form of Volume I of the transcript are inconsistent with the numbering contained in the paper copy of Volume I. The page numbers cited herein refer to the paper copy of the transcript. "ALJ" refers to ALJ Susan A. Flynn. "ALJD" refers to the ALJ's decision, dated January 30, 2014.

concerted activities. Both Antilla and Brandt's performance improvement plans ("PIPs") terminating them expressly reference their protected activities. (GCX 4, GCX 5) In addition, both of their PIPs state that Respondent has "zero tolerance" for conduct that is 'inappropriate or detrimental to patient care or hospital operations or that impedes harmonious interactions and relationships,' mirroring the unlawful language from the introductory paragraph of the Surgical Code.[2]

Further, the ALJ found that Respondent relied upon Giannosa and Andrews-Johnson's notes in making the decision to discharge Antilla (ALJD p. 8, lines 5-7), and these notes contain direct evidence that Antilla's protected concerted activity was a factor in the decision to terminate her. (Tr. 465, 586; RX 11, RX13, RX10, GCX27)

Indeed, as the ALJ found (ALJD p. 7, lines 29-41), when Antilla was confronted by management about her alleged behavior at the November 5 meeting,[3] "[s]he was told her name had been brought up by a few nurses as being negative, about making comments about her nursing license being on the line and other remarks about new staff, and how she felt new nurses shouldn't be working in labor and delivery." (Tr. 153-155; RX 25) These are matters that constitute protected concerted activities. See ***Parr Lance Ambulance Service,*** 262 NLRB 1284, 1286-1287 (1982) (EMT's concerns that missing equipment as it related to patient care put his

[2] Respondent denied relying upon the Surgical Code, which was only applicable to Brandt, in terminating her. (Tr. 501) However, in Respondent's position statement (GCX37), Respondent stated that Brandt engaged in prohibited conduct set forth in the Surgical Code (RX6). As discussed in the GC's Exceptions Brief (Exc. Br., p. 39-40), the ALJ erred by failing to find Respondent counsel's addition of a new justification for terminating Brandt during the investigation of the charge, which it claims was not relied upon, supports a finding of unlawful motivation.

[3] Respondent asserts that Antilla testified that Ronk "shared with her in September 2011 that she needed to speak more calmly." (Ans. Br., p. 3) This is a mischaracterization of testimony. Antilla testified that when she was reviewing her termination PIP at the November 9th meeting, she challenged the PIP's claim that Ronk addressed concerns with her in September 2011 about "being negative on the unit and lack of engagement in her role." (Tr. 163; GCX4) It was then, in response, at the November 9 meeting that Ronk told her to "talk calmly like her"—not in September 2011, as mischaracterized by Respondent. (Tr. 163) Antilla's unrebutted testimony was that no one from management had ever talked to her about alleged bullying or inappropriate behavior prior to November 5. (Tr. 168-169)

license at risk and put him at risk for a lawsuit protected); ***Misericordia Hosp. Medical Center v. NLRB***, 623 F.2d 808, 812-815 (2d Cir 1980) (nurse's participation in preparing a report, which described problems with staffing and cleanliness at the hospital, was protected concerted activity); ***Reading Hospital and Medical Center***, 226 NLRB 611 (1976), enfd. 96 LRRM 2512 (3d Cir. 1977) (holding an operating nurse's threat to complain to newspaper about how proposed elimination of surgical residency program might require her to perform surgical duties beyond her competence as protected). See also ***Summit Healthcare Association,*** 357 NLRB No. 134 slip op. at 4, n.12 (2011).

The record amply establishes that Respondent not only considered, but relied upon, Antilla and Brandt's protected concerted activities in deciding to terminate them.

II. RESPONDENT'S TOLERANCE OF EMPLOYER-SANCTIONED MEANS OF COMMUNICATING COMPLAINTS TO MANAGEMENT IS IMMATERIAL TO ITS HOSTILITY TOWARDS ANTILLA AND BRANDT'S PROTECTED CONCERTED ACTIVITIES

Respondent is not aided by its claims that it "encouraged" employees to voice complaints to management by participating in surveys, completing reports, commenting on Dr. Flanders' blog, or leaving messages on hotlines. (Tr. 520-532; RX 17, RX 18 RX 19, RX 20, RX 21, RX 23) The Act protects employees' rights to join together for "mutual aid and protection," and the fact that Respondent has established Respondent-approved channels for individual employees to raise issues to management is immaterial to whether Respondent discharged Antilla and Brandt for their protected concerted activities, and does not insulate Respondent from its unlawful acts.

III. RESPONDENT'S DISPARATE TREATMENT OF EMPLOYEES WHO WERE NOT ENGAGED IN PROTECTED ACTIVITIES AND WHO WERE NOT PERCEIVED AS "RINGLEADERS" SUPPORTS A FINDING OF UNLAWFUL DISCRIMINATION

Respondent, in its Answering Brief (Ans. Br., p. 7-9), sets forth a list of employees to whom Respondent issued lesser discipline than Antilla and Brandt for engaging in bullying and intimidating behavior. Notably, most of these employees were not engaged in protected concerted activities, and, if they were, they were not perceived by management as **"ringleaders."**

Although Ronk stated and Giannosa placed in Antilla and Brandt's PIPSs that Respondent had a "zero tolerance" policy with regard to intimidation and bullying, the record shows this was not the case. Thus, FBC surgical technologist Quiena Down received a Level II Performance Plan dated November 20, 2012, over a negative interaction with a physician, in which Down behaved in "an aggressive manner, with strong body language." She had prior incidents of inappropriate behavior and sleeping on the job. She was not terminated. (GCX 25(a)) On April 5, 2013, FBC nurse Madonna Ladoucer received only a "note to file" for being intimidating, mean spirited, and making patronizing comments to other employees. (GCX 25(b))

In September 2012, nursing assistant Clinton Burke received only a Level II Performance Plan with a three-day suspension for harassing and repeatedly contacting an employee who did not want him contacting her, and where a security report was created in response to his actions. Prior to the suspension, he had received numerous counselings for documentation issues, falling asleep on the job, failing to assist a nurse who asked for help, and poor job performance related to patient complaints of being rude and only turning a patient once during a shift. (GCX 25(c))

Also in September 2012, CRNA Sheryl Dalton was issued only a two day suspension for an inappropriate encounter she had with an anesthesia student during which she "compress[ed]"

the student's neck. (GCX 25(d)) In December 2012, Dalton was issued a Level II Performance Plan without a suspension for making an offensive gesture, possibly in front of a patient's family, being inappropriately rude in front of patients, and not being willing to cooperate with staff. (GCX 25(e))

In December 2012, RN Rachelle Dowdell was issued only a Level II Performance Plan with no suspension after a complaint was made about her treatment of a transporter in front of a patient's family. The Performance Plan reflects that, prior to the Level II Performance Plan, Rachelle had been counseled in February 2012 about her interaction with a co-worker. The Performance Plan required Dowdell to take recommended communication classes through Beaumont University. (GCX 25(f)).

Respondent's witnesses testified that, in March 2012, Diana Glinski was to be terminated for making negative comments about coworkers, and making negative and demeaning comments about patients, however, she resigned and it was never issued to her. (Tr. 488-489) Glinski had received a prior counseling in October 2011 for refusing an assignment, delegating an assignment to a new nurse, and bullying behaviors. (GCX 25(g)) A few weeks before Glinski's alleged resignation before she was to be terminated, Glinski complained to Respondent's CEO about inadequate staffing during midnight shift. (Tr. 93-94; RX 16)

In July 2012, graduate nurse LaDonna Hardrick was placed on a 60-day layoff during her orientation for exhibiting negative behavior. (GCX 25(i))

In November 2012, Linda Rafferty was issued a Level II Performance Plan for having a verbal confrontation, using profanity, in front of patients. The Performance Plan listed as background numerous other complaints about Rafferty's "rude and abrupt behavior" in March and November 2012. (GCX 25(k))

In March 2012, Michele Wonch received a "note to file" from Knudsen, stating that this was the third time in 2012 that Knudsen met with Wonch to "caution her" regarding negative behavior, including "talking behind coworkers[']s backs," "'mocking' coworkers," and "indulging in negative and unconstructive criticism of unit and fellow employees." The note states that "any further instances of negative behaviors towards peers will not be tolerated, and will result in corrective action." (GCX 25(l))

Despite Respondent's findings that Wonch was a "bully" and Respondent's decision to issue Wonch a PIP or a counseling (RX 12), Wonch was not issued any counseling, performance plan, or "note to file" in relation to Tina Wadie's resignation. Respondent produced, in response to GC's subpoena for "all notations of counselings, communication reports, warnings, disciplines, suspensions, plans for performance improvement, and notices of discharge/termination issued to Respondent's employees for bullying, intimidation, failing to exhibit teamwork . . .or similar behavior during the time period December 1, 2011, through the present," responsive documents involving direct patient care workers at Respondent's Royal Oak hospital. The responsive documents are in evidence as GCX 25, and do not include any note, counseling, or PIP for Wonch other than her March 2012 "note to file." (Tr. 403; GCX 3, page 3, paragraph 2; GCX 25) Significantly, Respondent distinguished Wonch, and Lori Post, who was only counseled in response to Wadie's resignation, from Antilla and Brandt, in that Wonch and Post were not perceived by Respondent to be **"ringleaders." (**Tr. 476, 492-493)

The evidence shows no other instance where an employee with no disciplinary record was terminated as occurred with Antilla. In addition, the only employee other than Brandt who skipped from a disciplinary counseling to termination, which was never even issued (Tr. 488-

489), was Glinski, who complained to Respondent's CEO about inadequate staffing during midnight shift. (Tr. 93-94; RX 16)

Evidence of disparate treatment is one of the more reliable hallmarks of unlawful discrimination. See, e.g., ***Avondale Industries***, 329 NLRB 1064, 1066 (1999). The distinguishing factor between the discriminatees and all other employees who received lesser discipline was that Respondent knew they were engaged in protected concerted activities, and perceived them as **"ringleaders"** of that **"negativity."**

IV. RESPONDENT'S RELIANCE ON *CORRECTION CORP. OF AMERICA* IS MISPLACED

Respondent argues (Ans. Br., p. 10-12) that it was justified in terminating Antilla and Brandt based upon the reasoning in ***Corrections Corp. of America,*** 355 NLRB No. 110 (2010), adopting 354 NLRB 940 (2009). However, Respondent's reliance on ***Corrections Corp.*** is misplaced. That case involved a corrections facility which, following being placed in receivership by a federal court pursuant to a lawsuit and after an inmate's death, learned that it was in danger of losing its contract with the state of California if it failed immediately to correct deficiencies in its medical department, including hiring additional registered nurses. Within the next two months, two registered nurses resigned, citing a nurse with a history of confrontational behavior as the cause. Also during that time, a third nurse during those same months asserted that the same nurse yelled at her and pushed her during a confrontation. Then, the same nurse instigated a confrontation with her supervisor in front of subordinates, involving a life-threatening situation with a patient. The Board found that, because the nurse's confrontational behavior was challenging the employer's ability to avoid the imminent danger of losing its contract, and thus shutting down, the employer was justified in discharging the nurse.

Antilla and Brandt's situation is much different. To begin, only Wadie resigned, and in her email she stated that she felt she was not capable of doing the job. (RX 9) She told Giannosa that the behavior she experienced on the FBC was not bullying. (GCX 26) There was no evidence in ***Corrections Corp.*** that the inappropriate behavior the nurse was accused of engaging in constituted protected concerted activity, in contrast with that of Antilla and Brandt. Respondent was not experiencing an imminent threat of closure if it failed to discharge Antilla and Brandt, as the employer in ***Corrections Corp.*** was. Moreover, although Respondent asserts (Ans. Br., p. 11-12) that the sentinel event of an infant death was a similar circumstance to that in ***Corrections Corp.,*** it is undisputed that Antilla and Brandt were not working the night of the sentinel event.[4]

V. RESPONDENT INCORRECTLY IMPLIES THAT AN ACTUAL CHILLING EFFECT MUST BE DEMONSTRATED FOR A WORK RULE TO VIOLATE SECTION 8(a)(1)

Respondent argues (Ans. Br., p. 24) that "a policy that violates [Section] 8(a)(1) generally has a chilling effect," and discusses extrinsic evidence that it claims supports a finding that Section 7 activity was not chilled by the Surgical Code. This is a misreading of the standard. Here, the applicable consideration is whether employees would reasonably construe the language to prohibit Section 7 activity. ***Palms Hotel and Casino***, 344 NLRB 1363, 1367 (2005); ***Lutheran Heritage Village-Livonia***, 343 NLRB 646, 646 (2004). Analysis of a rule does not require a demonstration that Section 7 activity actually has been chilled, as Respondent suggests. Indeed, the Board recently affirmed that extrinsic evidence is not required to find that a work rule is unlawfully overbroad and ambiguous by its terms. ***Hills and Dales General Hospital***, 360 NLRB No. 70 (2014).

[4] Notably, Michele Wonch was working the night of the sentinel event (Tr. 570), yet she was not counseled or disciplined as a result of the investigation resulting from Wadie's resignation, despite being named as a "bully." (GCX25)

As discussed in the GC's Exceptions Brief (p. 23-27), the introductory paragraph and prohibitions set forth in the Surgical Code would reasonably be read by employees to prohibit Section 7 activities, and the ALJ erred by failing to find that the introductory paragraph and all of the prohibitions contained in the Surgical Code violated Section 8(a)(1). Respondent argues (Ans. Br., p. 25) that the Surgical Code addresses conduct that is "malicious, abusive or unlawful," and the prohibitions are thus lawful. This claim amounts to Respondent simply trying to fit a square peg into a round hole. The prohibitions contained in the Surgical Code are the type that the Board consistently finds to be unlawful. See, e.g., ***2 Sisters Food Group***, 357 NLRB No. 168, slip op. at 2 (2011) (rule unlawful that subjected employees to discipline for the "inability or unwillingness to work harmoniously with other employees"); ***Claremont Resort & Spa***, 344 NLRB 832, 832 (2005) (rule prohibiting negative conversations about associates or managers unlawful on its face); ***Flamingo Hilton-Laughlin***, 330 NLRB 287, 287, 295 (1999) (rule unlawful which prohibited "disorderly conduct in the Hotel, including fighting, horseplay, threatening, insulting, abusing, intimidating, coercing or interfering with any guests, patrons, or employees"); ***Hills and Dales General Hospital***, supra (prohibitions on "negative comments" and "negativity" unlawful); ***Costco Wholesale Corp.***, 358 NLRB No. 106, slip. 1-2 (2012)(rule prohibiting comments that "damage the Company, defame any individual or damage any person's reputation" found unlawfully overbroad); ***Knauz BMW***, 358 NLRB No. 164, slip op. at 1 (2012)(rule stating that "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the [Company]" found overly broad).

Accordingly, and for the reasons set forth in the GC's Exceptions Brief (p. 23-27), the Surgical Code, with prohibitions an employee would reasonably read to discourage protected

concerted activities, violates Section 8(a)(1). The ALJ erred by failing to find the introductory paragraph and all of the prohibitions of the Surgical Code unlawful.

Counsel for the General Counsel respectfully requests that the Board grant its Exceptions and modify the Administrative Law Judge's Decision accordingly.

Respectfully submitted this 20th of May, 2014.

___/s/_Darlene Haas Awada_____
Darlene Haas Awada
Counsel for the General Counsel
NLRB, Region 7
Room 300, 477 Michigan Avenue
Detroit, Michigan 48226
darlene.haasawada@nlrb.gov

CERTIFICATE OF SERVICE

I certify that on the 20th day of May, 2014, I electronically served copies of the **Counsel for the General Counsel's Reply Brief in Support of Exceptions to the Administrative Law Judge's Decision** on the following parties of record:

Rebecca S. Davies
John P. Hancock
Butzel Long
150 W. Jefferson Ave.
Suite 100
Detroit, MI 48226
davies@butzel.com
hancock@butzel.com

Jeri Antilla
41295 Marks Dr.
Novi, MI 48375-4937
jeri_antilla@hotmail.com

/s/Darlene Haas Awada
Darlene Haas Awada
Counsel for the General Counsel